

JOE M. LARA, )  
 )  
 Plaintiff(s), ) No. C 04-4745 CRB (PR)  
 )  
 vs. ) ORDER GRANTING  
 ) MOTION TO DISMISS  
 SANTA CLARA COUNTY JAIL, et al., )  
 ) (Doc # 15)  
 Defendant(s). )

Per order filed on October 3, 2005, the court found that plaintiff's allegations that Jacquez and Duran assaulted him without justification stated a cognizable claim for damages under § 1983, when liberally construed, and ordered the United States Marshal to serve them. The court dismissed plaintiff's other allegations and named defendants under the authority of 28 U.S.C. § 1915A(b).

1 Defendants now move for summary judgment on the ground that plaintiff  
2 did not exhaust available administrative remedies under 42 U.S.C. § 1997e(a)  
3 before he filed suit. Plaintiff did not file an opposition.

4 The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to  
5 provide that "[n]o action shall be brought with respect to prison conditions under  
6 [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,  
7 prison, or other correctional facility until such administrative remedies as are  
8 available are exhausted." 42 U.S.C. § 1997e(a). Although once within the  
9 discretion of the district court, exhaustion in prisoner cases covered by §  
10 1997e(a) is now mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). All  
11 available remedies must now be exhausted; those remedies "need not meet  
12 federal standards, nor must they be 'plain, speedy, and effective.'" Id. (citation  
13 omitted). Even when the prisoner seeks relief not available in grievance  
14 proceedings, notably money damages, exhaustion is a prerequisite to suit. Id.;  
15 Booth v Churner, 532 US 731, 741 (2001). Similarly, exhaustion is a  
16 prerequisite to all inmate suits about prison life, whether they involve general  
17 circumstances or particular episodes, and whether they allege excessive force or  
18 some other wrong. Porter, 534 U.S. at 532.

19 Nonexhaustion under § 1997e(a) is an affirmative defense. Wyatt v.  
20 Terhune, 315 F.3d 1108, 1119 (9th Cir 2003). It should be treated as a matter of  
21 abatement and brought in an "unenumerated Rule 12(b) motion rather than [in] a  
22 motion for summary judgment." Id. (citations omitted). In deciding a motion to  
23 dismiss for failure to exhaust administrative remedies under § 1997e(a), the court  
24 may look beyond the pleadings and decide disputed issues of fact. Id. at 1119-  
25 20. If the court concludes that the prisoner has not exhausted the appropriate  
26 administrative process, the proper remedy is dismissal without prejudice. Id.

1 Here, defendants raise nonexhaustion in a motion for summary judgment  
2 and argue that plaintiff's prisoner action should be dismissed because plaintiff  
3 failed to exhaust the administrative grievance process of the Santa Clara County  
4 Department of Corrections despite being given specific instructions on how to do  
5 so. They submit evidence showing that a review of the jail's administrative  
6 grievance process records reveals that plaintiff did not file any administrative  
7 grievances or appeal regarding this matter. Defendants' motion (doc # 15) is  
8 construed as an unenumerated Rule 12(b) motion to dismiss and GRANTED.  
9 Despite being advise to "'develop a record' and present it in your opposition in  
10 order to dispute any 'factual record' presented by the defendants in their motion to  
11 dismiss," Oct. 3, 2005 Order at 4 (quoting Wyatt, 315 F.3d at 1120 n.14),  
12 plaintiff has submitted no opposition or evidence showing that he satisfied the  
13 exhaustion requirement of § 1997e(a).

14 For the foregoing reasons, defendants' motion to dismiss for failure to  
15 exhaust administrative remedies (doc # 15) is GRANTED and the action is  
16 DISMISSED without prejudice.

17 The clerk shall enter judgment in accordance with this order and close the  
18 file.

19 SO ORDERED.

20 DATED: April 27, 2006

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23 CHARLES R. BREYER  
24 United States District Judge  
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